Supreme Court, U.S.
FILED
05-544 OCT 3 2005
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ERMAND and MIRELA HYSI,
Petitioners,

v.

ALBERTO R. GONZALES, as
Attorney General of the United States,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit err when it affirmed the decision of the Immigration Judge rejecting Mr. Hysi's entire claim for asylum and withholding of removal based upon two newspaper articles found to have had author attributions added after publication? The Judge rejected Mr. Hysi's entire testimony, that of Mr. Hysi's expert who had visited Albania and researched the case while there, and other evidence including a medical report showing severe injuries requiring a week of hospital treatment, based upon the Judge's view that presenting even one piece of fraudulent evidence seriously undermines the entire case's credibility. The Seventh Circuit's rule requires proof that Mr. Hysi knew the articles to have been fraudulently altered when he filed them. The Seventh Circuit points to no such proof in this record.

2. Did the Seventh Circuit err when it held that it was readily apparent that the Judge had not relied on the Government's counsel's allegation that Mr. Hysi had confessed to his counsel that he had committed perjury? The Judge expressly stated in a footnote that she would give that allegation minimal weight. The Judge did not define minimal weight. This Court's rule bans *post hoc* rationalizing of gaps in agency decisions. The Seventh Circuit pointed to nothing in the record from which it knows that the Judge meant "no weight" when she stated "minimal weight."

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OPINION BELOW

The Seventh Circuit Court of Appeals' opinion is published in the Federal Reporter at 411 F.3d 847 (2005). The slip opinion is reproduced in the Appendix at 1-15. The Seventh Circuit denied rehearing and rehearing *en banc*, 2005 US App. LEXIS 18058 (7th Cir. Aug. 19, 2005). The Board of Immigration Appeals affirmed without opinion in a *per curiam* decision adopting the decision of the Immigration Judge and designating the Immigration Judge's decision as the Agency's final determination. The Immigration Judge's decision is reproduced in the Appendix at 16-29.

JURISDICTION

The Seventh Circuit filed its decision on June 15, 2005, and entered its decision denying petitioners' petition for rehearing and suggestion for rehearing *en banc* on August 19, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Seventh Circuit's decision on writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1101 (a)(42)(A)

The term "refugee" means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...

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8 U.S.C. § 1231(b)(3)

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

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8 U.S.C. § 1229c(b)

At the conclusion of the hearing, the Attorney General may permit an alien voluntarily to depart the United

States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that–

> (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;
>
> (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;
>
> (C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section (1227)(a)(4) of this title; and
>
> (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

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8 C.F.R. § 1208.16(c)(4)

In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely

than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under Sec. 1208.17(a).

STATEMENT OF FACTS

Petitioners are natives and citizens of Albania. The Immigration and Naturalization Service ("INS" or "Service") admitted petitioner Ermand Hysi ("Mr. Hysi") as a visitor for pleasure on November 28, 1996 and authorized him to remain in the country until June 14, 1997. Mr. Hysi filed his asylum application on July 17, 1997 and named his wife, Mirela Hysi, ("Mrs. Hysi") as a derivative applicant or beneficiary of that same application. Mrs. Hysi arrived almost a month later. Mr. and Mrs. Hysi have a son who, at four years of age, arrived in this country following his father and ahead of his mother.

After the Service considered Mr. and Mrs. Hysi's asylum application, and after determining that it could not grant them asylum, the Service referred the asylum application to

the Executive Office for Immigration Review ("EOIR"), to the Immigration Judge ("IJ"). The Service also filed with the IJ the August 27, 1997 Notices to Appear ("NTA") it had issued to Mr. Hysi Mrs. Hysi, respectively, under 8 U.S.C. § 1229(a)(1).

That filing of the NTAs vested the IJ with jurisdiction over the case and commenced removal proceedings under 8 U.S.C. § 1229a against Mr. Mrs. Hysi. The minor son is not in removal proceedings.

Mr. Hysi worked in Albania under the Berisha government as a manager. That position gave Mr. Hysi responsibility for filing and archiving personnel documents and maintaining protocol for the institution's personnel. Mr. Hysi also managed building maintenance personnel, in addition to a part-time seat he held on a committee in charge of returning private property the communist regime prior to Berisha's had confiscated, to the land's rightful owners. Mr. Hysi evaluated the claims and prepared them for the committee Chairman's adjudication.

At the government archive, Mr. Hysi and his supervisor were at loggerheads over Mr. Hysi's opposition to the hire of supporters of the former communist rulers. At the land committee, Mr. Hysi opposed what he saw as the Chairman's cronyism, distributing land to high-ranking government officials without proof of ownership, and outright corruption by accepting bribes in exchange for title. Mr. Hysi's supervisor at the government archive fired Mr. Hysi, followed soon after by the land committee Chairman who also fired Mr. Hysi.

Upon losing those jobs, Mr. Hysi joined the opposition Right Democratic Party known in Albania as the "DPP" in January of 1996. He freelanced for newspapers owned by DPP members or supporters, THE RIGHT and THE POLE OF THE CENTER, and received compensation. The articles also earned Mr. Hysi the adverse attention of the government or its supporters who sought to silence Mr. Hysi through violence and intimidation.

On May 26, 1996, four people Mr. Hysi recognized from his days working for the Berisha government abducted Mr. Hysi and took him into the mountains. They threatened more trouble if he did not cease criticizing the government in his articles. They then beat Mr. Hysi unconscious and left him in the mountains. Although hurt, Mr. Hysi did not seek medical attention that time.

Mr. Hysi visited his cousin in the U.S. in June, 1996 as a way to get a respite. During that visit, Mr. Hysi wrote two articles and sent them by facsimile transmission to the newspapers in Albania, which published them on August 7, 1996 and August 30, 1996, respectively. Mr. Hysi returned to Albania in September.

Soon after his return, the authorities detained Mr. Hysi on October 16th and 17th, and interrogated and beat Mr. Hysi for embarrassing the Albanian authorities. However, Mr. Hysi continued his political activities and spoke out at DP meetings including about having been mistreated by the government.

The same assailants who abducted him in May abducted Mr. Hysi on November 10, 1996 and beat him again. This

time, they threatened Mr. Hysi with death if he continued his political activities. Mr. Hysi needed hospitalization for a week because of his injuries. Upon release from the hospital, he fled to this country.

Pressure then focused on his wife whom they told that if Mr. Hysi returned, he would face physical harm. Mrs. Hysi was so frightened herself that she fled to join her husband after sending their son.

Mr. Hysi and an expert on Albania country conditions, Prenk Camaj, were the sole witnesses testifying in this case. Camaj had visited Albania while this case was pending and had inquired about Mr. Hysi and his activities and verified significant aspects of Mr. Hysi's claim. Camaj also clarified linguistic problems concerning the initial completion of Mr. Hysi's asylum application. The documentary evidence Mr. Hysi presented included numerous reports and articles on Albania as background information on that country's conditions. He also presented certificates corroborating his work for the Berisha administration and other proof including a medical report showing the physical injuries and treatment after the November 10, 1996 attack.

The record also has in it the two questioned articles the Service's Forensic Document Laboratory ("FDL") concluded had been altered to add Mr. Hysi's name as author.

Mr. Camaj, Petitioners' expert witness on Albanian affairs, testified that he had spent many hours with Mr. Hysi, both in person and by telephone, and had personally traveled to Albania and investigated aspects of Mr. Hysi's claim on the scene. Camaj testified that he had personally spoken with

Deputy Chief Judge of the Albania Supreme Court, Zef Nikaj, his first cousin, who knew first-hand about Mr. Hysi's employment by the Albanian government. DCJ Nikaj was also aware of the fact that Mr. Hysi had written the two articles the DPP newspapers had published in August 1996.

Camaj further testified that he had spoken with a commander of presidential security in the Berisha government, Alfred Tare, General Halit Gjecaj, Mr. Hysi's cousin, who was in charge of the country's security under the Berisha government, and Belul Celo, Interior Minister following the riots of 1997. Camaj testified that former Minister Celo told Camaj that the Albanian government has "a large file" on Mr. Hysi.

Based upon the FDL's report, the IJ concluded that presentation of fraudulent documents seriously undermined Mr. Hysi's credibility and that the case was on all fours with the precedent of the Board of Immigration Appeals in *Matter of O-D-*, 21 I. & N. Dec. 1079 (BIA 1998). The IJ discounted Mr. Hysi's claims because she found they had not been sufficiently developed or corroborated.

The IJ rejected the expert, Camaj's, testimony because the IJ held that the expert had derived his testimony from Mr. Hysi's claim that he was the author of the two articles the FDL found to have been altered. Finally, the IJ held that any threats leveled at Mrs. Hysi after Mr. Hysi's flight from Albania are belied by the fact that Mr. Hysi's father, mother and brother continue to live in Albania, and Mr. Hysi's claim that his father is regularly mistreated by the government had not been corroborated.